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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY

Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Mr. M. Cherif Bassiouni, submitted pursuant to Commission on Human Rights resolution 1998/43

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I. INTRODUCTION

1. The present report is submitted pursuant to Commission on Human Rights resolution 1998/43 in which the Commission, recalling its resolution 1996/35 of 19 April 1996, in which it regarded the draft basic principles and guidelines on the right to reparation for victims of [gross] violations of human rights and international humanitarian law prepared by Mr. Theo van Boven as a useful basis for giving priority attention to the question of restitution, compensation and rehabilitation, noting with appreciation the report of the Secretary-General (E/CN.4/1998/34), submitted to the Commission in compliance with its resolution 1997/29 and noting with interest the positive experience of countries that had established policies and adopted legislation on restitution, compensation and rehabilitation for victims of grave violations of human rights, called once more upon the international community to give due attention to the right to restitution, compensation and rehabilitation for victims of grave violations of human rights.

2. Pursuant to paragraph 2 of resolution 1998/43, the Chairman of the Commission on Human Rights appointed an expert, Mr. M. Cherif Bassiouni, to prepare a revised version of the draft basic principles and guidelines elaborated by Mr. van Boven, taking into account the views and comments provided by States, intergovernmental and non-governmental organizations, and to submit it to the Commission on Human Rights at its fifty-fifth session, with a view to its adoption by the General Assembly. 1/

3. At the outset, the expert wishes to commend the excellent work carried out by Mr. Theo van Boven, former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the right to restitution, compensation and rehabilitation of gross violations of human rights and fundamental freedoms, which has brought the draft guidelines to their present stage in spite of the complexity of the issues involved. As former Special Rapporteur, Mr. Theo van Boven played an instrumental role in studying and reporting on the question of restitution, compensation and rehabilitation. 2/

4. The expert also wishes to express his deep appreciation for the work of Mr. Louis Joinet. In his capacity as Special Rapporteur of the Sub-Commission on the question of the impunity of perpetrators of violations of human rights (civil and political), 3/ - a mandate separate and distinct from that of Mr. Theo van Boven - Mr. Joinet developed a set of principles on the problem of impunity that relates directly to the question of the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms. 4/

5. The Expert intends to build upon the strong foundation provided by the two Special Rapporteurs and, in this spirit, work constructively to bring the guidelines to fruition. To this end, this report first takes stock of the progress achieved to this point in furtherance of the Commission mandate on the right to reparation by outlining the main themes of the guidelines proposed by Messrs. van Boven and Joinet in their respective reports.

6. Differences and discrepancies in these guidelines over the use of terms are then highlighted in order to uncover remaining ambiguities. Next, the

General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 5/ is compared to the van Boven and Joinet Guidelines. It should be noted also that, over the past five years or so, references to the terms "restitution", "compensation" and "rehabilitation", "reparations" and "redress" relative to human rights violations have appeared in a large number of United Nations reports. To take only a few examples, reports submitted in accordance with the thematic mandates of the Commission or the Sub-Commission on torture, 6/ on extrajudicial, summary or arbitrary executions, 7/ on violence against women, 8/ on systematic rape, sexual slavery and slavery-like practices during armed conflict, 9/ and on the adverse effects of the illicit movement and dumping of toxic waste on the enjoyment of human rights, 10/ all refer to one or more of these elements, as do a number of country mandate reports, 11/ reports of other bodies such as the Commission's Working Group on Enforced or Involuntary Disappearances 12/ or the Sub-Commission. 13/ There have also been a number of developments in connection with the United Nations Congress on the Prevention of Crime and the Treatment of Offenders. 14/ Taken cumulatively, these various initiatives carry the potential to produce a multiplicity of standards, principles, interpretations and terms.

7. Next, the provisions on reparations for victims contained in the Statute of the International Criminal Court are assessed. This report then surveys some of the principal issues to be resolved before the guidelines can be properly revised. In this connection, the expert concludes with a number of recommendations indicating the approach he intends to take in order to fulfil the terms of the mandate conferred upon him by the Commission in resolution 1998/43. 15/

II. PROGRESS ACHIEVED ON THE MANDATE TO THIS POINT: AN OUTLINE OF THE GUIDELINES PROPOSED BY MR. VAN BOVEN

A. Structural differences between the 1993 and 1996 versions of the van Boven Guidelines

8. Mr. van Boven introduced several changes in the overall structure of the 1996 version. The following sections outline the basic structure of the 1993 and 1996 versions and articulate any changes made in the 1996 version. The 1997 proposed version contains an identical structure to the 1996 version, thus all comments made in reference to the 1996 version apply also to the 1997 revised version. The 1993 version is divided into three sections: General principles, Forms of reparations, and Procedures and mechanisms. In the General principles 16/ section, the 1993 version focuses on (i) a victim's right to reparation; (ii) the State's duty to make reparation; (iii) the purpose of reparation; (iv) the scope and proportion of reparation; (v) the duty to prosecute and punish perpetrators of crimes under international law; (vi) who may claim reparation; and (vii) collective reparation and opportunities for group self-advancement. In the "Forms of reparation" 17/ section, the report defines what reparations shall be available to victims. The section defines and discusses (i) restitution; (ii) compensation; (iii) rehabilitation; and (iv) satisfaction and guarantees of non-repetition. Concerning Procedures and mechanisms, the 1993 version 18/ focuses on the requirement for a State's legal system to: (i) maintain prompt and effective procedures, with universal jurisdiction, for violations under international

law; (ii) ensure that the right to reparation is accessible; (iii) publicize the available procedures for reparations; (iv) ensure that statutes of limitations are not applicable to gross violations; (v) ensure victims are not coerced into waiving claims; (vi) have access to all the State's evidence of violations; (vii) take into account that evidence might be limited or unavailable; (viii) protect victims and witnesses from intimidation and reprisal; and (ix) promptly implement all decisions relating to reparations and institute procedures for review and appeal.

9. The 1996 version is divided into six sections: The duty to respect and ensure respect for human rights and humanitarian law; Scope of the obligation to respect and to ensure respect for human rights and humanitarian law; Applicable norms; Right to a remedy; Reparation; and Forms of reparation.

10. The first section articulates the principle that every State has the duty to respect and ensure respect for human rights and humanitarian law. 19/ The second section outlines the scope of the obligation to respect and to ensure respect for human rights and humanitarian law, 20/ considering it a State's duty: to prevent violations, to investigate violations, to take appropriate actions against the violators, and to afford remedies and reparations to victims. 21/ The third section announces that a State must observe the applicable human rights and humanitarian norms of international law and that these must be incorporated in national law. It also provides that, in the event of discrepancies between international and national norms, the State must apply the norm affording the higher degree of protection. 22/

11. The "right to a remedy" 23/ is indicated to require that: (i) each State ensure that adequate remedies are available to any person claiming a violation of rights and ensure their right of access to these remedies; (ii) each legal system provide prompt and effective procedures to ensure readily accessible and adequate remedies, and protection from intimidation and retaliation; and (iii) each State provide universal jurisdiction over gross violations of human rights and humanitarian law. This section is a portion of what was the procedure section of the 1993 report.

12. The reparation section delineates who may claim reparation (direct victims, immediate family, dependents, etc.) and how it may be claimed (individually and collectively). 24/ The section 25/ also requires that: States (i) adopt special measures to permit expeditious and fully effective reparations, redressing the consequences of wrongful acts in proportion to the gravity of the violation; (ii) publicize the available procedures for reparations; (iii) ensure that the statute of limitations does not apply for gross violations; (iv) make available to the competent authorities all information in its possession relevant to the determination of claims for reparation; (v) implement all decisions relating to reparations in a diligent and prompt manner. This section is a blending of elements of the General principles section and the Procedure for reparations section of the 1993 version.

13. The Forms of reparation section, 26/ like its counterpart in the 1993 version, defines what reparations shall be available to victims. The section defines and discusses: (i) restitution; (ii) compensation; (iii) rehabilitation; and (iv) satisfaction and guarantees of non-repetition.

B. Substantive differences

14. While the structure of the versions since 1993 is noticeably different, the substance of the different sets of guidelines varies only slightly. The following section outlines the substantive changes between the versions. Changes have not been considered substantive if they were merely rearranged or redrafted for clarity. The following are examples of omissions or additions of important qualifying language, issues and principles.

1. The duty under international law

15. One significant change between the 1993 and 1996 versions is the express mention of a State's duties under international law. 27/ The 1993 version clearly enunciates a State's duty to make reparation for violations of human rights; 28/ however, it is less clear in its assertion that a State has a duty to respect and ensure respect of human rights. In contrast, the 1996 version clearly articulates this duty as its first principle. In addition, the 1996 version states that this duty extends to humanitarian law as well as human rights. 29/ There is no indication however, as to the source or sources of that duty nor of the consequences of its breach. 30/

2. The enumeration of offences

16. The first principle of the 1993 version states that "under international law, the violation of any human right gives rise to a right of reparation for the victim". 31/ The principle goes on to state:

> "Particular attention must be paid to gross violations of human rights and fundamental freedoms, which include at least the following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on gender." 32/

17. This enumeration of offences is omitted in the 1996 version, which does not focus on any particular offence involving the violation of human rights or humanitarian law. In place of the portion of the 1993 principle that focuses attention on particular offences, the 1996 version simply indicates that the human rights norms each State must respect are defined by international law. 33/

3. The issue of impunity 34/

18. One major substantive difference between the 1993 and 1996 versions involves the issue of impunity with respect to criminal prosecutions. Several principles in the 1993 version contain strong language intended to prevent impunity with respect to criminal sanctions. Specifically, the 1993 version requires a State to "take appropriate action against the violators" 35/ and to "ensure that no person who may be responsible for gross violations of human rights shall have immunity from liability" 36/ In addition, one principle in the 1993 version states that "reparation for certain gross violations of human rights that amount to crimes under international law includes a duty to

prosecute and punish perpetrators". 37/ The principle concludes with the pronouncement that "impunity is in conflict with this principle". 38/ The 1993 version does not, however, address non-criminal methods of accountability, such as truth commissions 39/ and the like, nor issues of amnesty and the consequences of these issues on the victim's right to various modalities of redress. Finally, the principle in the 1993 version that deals with satisfaction and guarantees of non-repetition includes "bringing to justice the persons responsible for violations". 40/

19. The 1996 version eliminates all of the above language. In its place, the 1996 version states that "particular attention must be paid ... to the duty to prosecute and punish perpetrators of crimes under international law". 41/ Also, in the section regarding satisfaction and guarantees of non-repetition the phrase "bring to justice the persons responsible for the violations" 42/ is replaced with "judicial or administrative sanctions against the persons responsible for the violations". 43/ In addition, prior to listing the steps that shall be provided to ensure satisfaction and guarantees of non-repetition, the 1996 version adds the language "as necessary". 44/ This perhaps gives an impression that the "judicial or administrative sanctions" are optional or at the discretion of the State.

20. While the 1996 version still enunciates a "duty to prosecute and punish", it seems to lessen the emphasis on criminal sanctions. Finally, with respect to those who possess the duty to make reparation and ensure respect for human rights, the 1993 version states that "where these principles refer to States, they also apply, as appropriate, to other entities exercising effective power". 45/ This language is absent in the 1996 version; thus, the obligations envisaged in the 1996 version seemingly would flow only to States.

4. The issue of reparations

21. The sections of both versions that define and discuss the forms of reparation available to victims are virtually identical, although with variations. For example, the 1993 version states that reparations shall include: "restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition". 46/ While the 1996 version also contains that language, 47/ it begins the section by stating that "reparations may take any one or more of the forms mentioned below (restitution, compensation, rehabilitation, satisfaction and guarantees of non repetition), which are not exhaustive". 48/ While the 1993 version seems to mandate all four forms, this change in the 1996 version perhaps demonstrates a greater flexibility for the State in determining reparations. Thus, under the 1996 version a victim might receive any combination of the enumerated forms of reparation or other types that are not yet formulated.

22. With respect to the definition of "restitution", 49/ the 1996 version adds the restoration of "family life" and "return to one's place of residence" to the other requirements: restoration of liberty, citizenship and employment of property. It is perhaps important to note that the language "return to one's place of residence" replaced restoration of "citizenship or residence". 50/ While the language seems similar, the connotation is quite different between "place of residence", which seemingly invokes a return to one's previous home, and restoration of "residence", which invokes a return to

the country of residence, such as for a person who is a permanent resident. This is especially true when the word is used alternatively with "citizenship".

23. With respect to the enumeration of damage for which compensation shall be provided, the 1996 version eliminates "harm to property or business, including lost profits", 51/ and replaces this language with "material damages and loss of earnings, including loss of earning potential". 52/ The sections concerning satisfaction and guarantees of non-repetition contain the changes referred to in the previous section of the present report. 53/ In addition to those changes, the 1996 version replaces the language calling for "a declaratory judgement in favour of the victim" 54/ with "an official declaration or a judicial decision restoring the dignity, reputation and legal rights of the victim and/or of persons connected with the victim". 55/ This expanded language clearly articulates the contents of the decree and, most importantly, calls for the restoration of legal rights.

24. It may also be important to distinguish the traditional question of State to State reparations from the question of State reparations owed to aliens, particularly in the light of distinct norms of customary international law on these matters. Both of these questions relate to but are distinct from the issue of the scope of a right in international law to reparation as a form of redress in the claims of a national or nationals of a given State, proceeding under national law, in respect of human rights violations. Neither are aspects of national procedures covered. Thus, the question remains as to how these guidelines can be implemented under national law. Similarly, it is unclear what remedies may be available under international law to the individual claimant.

5. Procedural issues

25. A final difference between the 1993 and 1996 guidelines is the express language in the earlier version to the effect that procedures for "follow-up, appeal or review should be devised". 56/ This language is eliminated in the 1996 version.

C. The 1997 proposed changes

26. The 1997 proposed changes to the 1996 version consist of the addition or deletion of modifying language. The structure of the 1997 proposed version is identical to that of the 1996 version. The first substantive change is the deletion from the title 57/ of the guidelines of the word "gross" modifying the violations that gave rise to the right for reparation. This change is significant in that it potentially widens the kinds of situation to which the guidelines would apply. 58/

27. It should be noted that in enunciating the duty to respect and ensure respect for human rights and international humanitarian law, the 1996 version never stated that this duty extended only to gross violations. 59/ Thus, it seems that the change in the title brings it more into line with the rest of the text, rather than modifying applicability. Moreover, this deletion is the only proposed elimination of "gross" from the text. Elsewhere, the word

remains to describe what type of violations a State should pay particular attention to 60/ and what type of violations the statute of limitations does not apply to. 61/

28. Another area of some ambiguity lies in the references to "humanitarian law", 62/ which, in the 1996 version, was modified to read more accurately as "international humanitarian law". This change, made throughout the text wherever human rights and humanitarian law were mentioned in the 1996 version, 63/ must be welcomed, since the term "humanitarian law" is not employed without the modifier "international". This change seems intended merely to specify that the body of international humanitarian law is to apply. In addition, the phrase "human rights and international humanitarian law" is added to delineate what types of victim may claim reparations. 64/ However, the term "international humanitarian law" is commonly understood to refer to norms contained in the laws of war and those prohibiting genocide and crimes against humanity. The term therefore does not cover all norms extant in international criminal law: certain crimes under international law do not figure as violations of international humanitarian law and vice versa. The resulting ambiguity is that it remains unclear whether the right to restitution, compensation and rehabilitation applies to crimes under international law which do not qualify as breaches of international humanitarian law or human rights.

29. The 1997 proposed changes also delete the phrase "in accordance with international law" to describe the State's duty to adopt special measures to permit expeditious and fully effective remedies. 65/ Presumably, international law no longer defines or sets a standard for this particular duty.

30. Final significant changes include the following. The word "closely" was added to describe the type of connection with the victim that is required for persons who might claim reparation in place of the victim; 66/ medicines and medical services were added as recoverable costs in the section on compensation for economically assessable damage; 67/ and "school" was added to describe the type of textbooks in which an accurate history of the violations would be included. 68/

III. COMPARISON OF THE PROPOSED GUIDELINES ON REPARATION FOR VICTIMS PREPARED BY MR. VAN BOVEN AND MR. JOINET RESPECTIVELY

31. This section compares the treatment of reparatiion for victims in the guidelines drafted by Mr. van Boven 69/ and Mr. Joinet 70/ respectively. The van Boven Guidelines focus exclusively on the issue of reparation for victims, while the Joinet Guidelines discuss the topic as an important component of a larger set of principles designed to combat impunity. The principal areas of convergence and divergence of these two sets of guidelines will be discussed with respect to the elements of reparation for victims, the right to reparation and procedural issues. Because there is an overlap between the two sets of proposed guidelines, it is important to identify such overlap and to ensure some level of consistency as to concepts, terms and modalities of redress whenever appropriate.

32. Since the main substantive difference between the two versions of the Joinet Guidelines is in the area of reparation for victims, this section will compare each separately with the van Boven Guidelines. With respect to the right to reparation and procedural issues, the two versions of the Joinet Guidelines are identical, and thus they will be discussed concurrently in the comparison with the van Boven guidelines.

A. Elements of reparation for victims: comparison of the van Boven Guidelines and the Joinet Guidelines

33. The van Boven and Joinet Guidelines are in agreement with respect to the vital elements of victim reparation: restitution, compensation, rehabilitation and guarantees of non-repetition. 71/ Notwithstanding, variances are apparent within each element.

1. Restitution

34. The measure of restitution under each set of guidelines is virtually identical; however, there are some slight differences. Specifically, the van Boven Guidelines call for a "return to one's place of residence", 72/ whereas the Joinet Guidelines refer to a "return to one's country". 73/ While these two phrases could be read as being synonymous, the van Boven Guidelines could also be interpreted to mean a return to one's original home. This second interpretation goes quite a bit further than the language in the Joinet Guidelines.

35. In addition, the van Boven Guidelines call for a restoration of liberty, while the Joinet Guidelines call for a restoration of the exercise of personal freedoms. 74/ Notwithstanding this, both are in complete agreement with respect to the remaining requirements of restitution: family life, citizenship, employment and property. 75/

2. Compensation

36. The types of compensation available under both sets of guidelines are also quite similar, with slight variances. One difference in the proposed revisions to the van Boven Guidelines is the inclusion of the costs of medicines and medical services in the assessment of damages. 76/ Additionally, the Joinet Guidelines state that the compensation "must equal the financially assessable value of all damage suffered". 77/ In contrast, van Boven states that compensation "shall be provided for any economically assessable damage". 78/ The Joinet Guidelines seem to be mandating a certain level of compensation (equal to the damage), while the van Boven Guidelines merely require that some amount of compensation be provided, which may or may not be equal to the damage. However, several other provisions in the van Boven Guidelines seem to assure that the damages awarded will not be nominal. For example, van Boven states that "reparations shall be proportionate to the gravity of the violations" 79/ and "every State shall ensure that adequate legal or other appropriate remedies are available". 80/

3. Rehabilitation

37. The rehabilitation measures enunciated in both sets of guidelines contain only slight differences. Both include medical, psychological, legal and social services. However, the Joinet Guidelines also include psychiatric care and allow for "other services". 81/

4. Satisfaction and guarantees of non-repetition

38. Perhaps, the widest divergence between the two sets of guidelines is in the area of guarantees of non-repetition, a divergence resulting from structural differences. The Joinet Guidelines offer more extensive treatment of the issue of non-repetition.

(a) Structural differences

39. The Joinet Guidelines contain a section on general or collective measures of reparation that is separate from the section on guarantees of non-repetition. 82/ Within that separate section the Joinet Guidelines outline several symbolic measures to be taken as moral and collective reparation and to satisfy the duty to remember. These measures consist of public recognition by the State of its responsibility, official declarations, rehabilitating victims, commemorative ceremonies, periodic tributes to the victims, and acknowledgement in history textbooks. 83/

40. The van Boven Guidelines do not overlook these important principles, but include them with guarantees of non-repetition in one section under the blanket heading "Satisfaction and guarantees of non-repetition". 84/ Other than the variance in structure, the symbolic measures are substantially the same in both sets of guidelines. However, the van Boven Guidelines specifically mention a public apology, 85/ while the Joinet Guidelines only provide for public recognition of responsibility. 86/

(b) Substantive differences in the guarantees of non-repetition

41. The two sets of guidelines call for quite different measures with respect to guarantees of non-repetition. The provisions of the van Boven Guidelines include, as necessary: (i) cessation of continuing violations; 87/ (ii) verification of the facts and full and public disclosure of the truth; 88/ (iii) restoring the legal rights of the victim; 89/ (iv) ensuring civilian control of the military and security forces; 90/ (v) restricting the jurisdiction of military tribunals; 91/ (vi) strengthening the independence of the judiciary; 92/ (vii) protecting persons in the legal profession and human rights defenders; 93/ and (viii) conducting and strengthening human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials. 94/

42. The Joinet Guidelines take a different approach, even though many of the above principles are present in other sections. Specifically, the Joinet Guidelines focus extensively on: (i) the disbandment of paramilitary groups; 95/ (ii) the repeal of emergency legislation; 96/ and (iii) administrative procedures vis-à-vis State officials implicated in serious human rights violations. 97/

B. The elements of reparation for victims: comparison of the van Boven Guidelines and the revised Joinet Guidelines

43. Perhaps, the most significant difference between the two versions of the Joinet Guidelines is that the revised version incorporates the van Boven Guidelines with respect to the elements of reparation for victims. 98/ Thus, most of the differences noted above between the van Boven and Joinet Guidelines with respect to the elements of reparation were eliminated in the revised Joinet Guidelines because the revised Joinet Guidelines define by incorporation the van Boven Guidelines definitions of "restitution", "compensation", "rehabilitation", and "general measures of satisfaction". However, it must be noted that the revised Joinet Guidelines expressly refer to the 1996 van Boven Guidelines, 99/ which perhaps raises questions as to whether the revised Joinet Guidelines would also incorporate the changes proposed in the 1997 van Boven Guidelines. 100/

44. Finally, in contrast to the previous version, the revised Joinet Guidelines do not include guarantees of non-repetition as an element of reparation. Nevertheless, the revised guidelines still discuss this issue in the section on the right to reparation 101/ - a departure from the van Boven Guidelines, which include guarantees of non-repetition as an element of reparations. 102/

C. Special measures

45. One special measure of reparation in the Joinet Guidelines not present in the van Boven Guidelines concerns cases of forced disappearance. 103/ The Joinet Guidelines call for notification of the family of the disappeared person and the return of the body in case of death. This special measure is to be taken regardless of whether the perpetrators have been identified, prosecuted or tried.

D. The right to reparation

46. The van Boven and Joinet Guidelines take varying approaches to enunciating the right to reparation and the corresponding duties of the State. The van Boven Guidelines begin by imposing a duty under international law to respect and to ensure respect for human rights and international humanitarian law. 104/ They define the obligation as including the duty: to prevent violations, to investigate violations, to take appropriate action against the violators, and to afford remedies and reparation to victims. 105/

47. In contrast, the Joinet Guidelines state that: "Any human rights violation gives rise to a right to reparation on the part of the victim or his beneficiaries, implying duty on the part of the State to make reparation and the possibility of seeking redress from the perpetrator". 106/

48. Another key difference is the van Boven Guidelines' reliance on the norms of international law. They clearly state the applicable norms and even specify that, in the event that norms of national and international law conflict, the norm providing the highest degree of protection shall apply. 107/

49. The Joinet Guidelines, however, never state the law that is to be applied to define the violations that give rise to a right to reparation. In addition, the Joinet Guidelines invoke the right to reparation only in the event of a violation of human rights law. 108/ In contrast, the van Boven Guidelines add violations of international humanitarian law to the actions that will give rise to the right to reparation. 109/ This leads to the conclusion that either the Joinet Guidelines do not differentiate between violations of human rights law and international humanitarian law, or those guidelines do not contemplate a remedy for violations of international humanitarian law.

E. Procedural issues

50. This section discusses some of the key points of convergence and divergence between the two sets of guidelines with respect to procedural issues.

1. Right of access

51. Both sets of guidelines provide, as a matter of right, access to available national and international forums. 110/ However, they do not indicate the type of forum; national legal systems differ significantly with regard to criminal, civil and administrative procedure. In addition, both provide for protection from intimidation and reprisal for exercising those rights. 111/ Both also clearly indicate that reparation may be pursued either individually or collectively, and allow for the exercise of the right to reparation by the victim's beneficiaries in place of the victim. 112/

52. However, other remaining questions deserve attention. There is a need to re-examine the form the guidelines should take and what status they should be accorded. One option would be not to accord the guidelines any legal status, in which case their value might well be questionable. Another alternative would be to consider the guidelines purely as providing non-binding standards and criteria at the international level rather than legal rules, but which, once incorporated in domestic law, would be enforceable at the domestic level.

53. If the guidelines were considered to have a legally binding character, then it would be critical to know what consequences flow from non-compliance, at both the international and national levels. Could claims be raised before the International Court of Justice by a State or other international legal person willing to take up the cause and recognizable as a party to legal proceedings? Would such claims arise only in respect of systematic or widespread breach of the principles? In other words, what would be the threshold of non-compliance before the matter could be considered one of international concern? What about recourse before United Nations human rights treaties bodies or other international human rights forums, perhaps at the regional level, for example, within the European, inter-American or African human rights systems? Would breach of the right to restitution, compensation and rehabilitation by a State give rise to a legal cause of action enforceable by affected individuals or groups? All these questions concerning locus standi, and more broadly, the role, character and status of the

guidelines, are too important to be ignored, particularly as they bear directly on the concrete rights and obligations concerning restitution, compensation and rehabilitation for human rights violations.

2. Statute of limitations

54. The two sets of guidelines also articulate similar provisions with respect to statutes of limitations. For example, both provide for the suspension of all limitations until adequate remedial procedures are put into place. 113/ However, they differ on the non-applicability of limitations. The Joinet Guidelines state that there will be no statute of limitations for the recovery of damages in civil actions brought by victims seeking reparation. 114/ In contrast, the van Boven Guidelines only provide this extensive measure for a civil action resulting from a gross violation. 115/ Thus, it seems, under the van Boven Guidelines, that, unless the violation rises to the level of "gross", a statute of limitations would begin to run as soon as remedial procedures were put into place. 116/ In this respect, it is important to distinguish between the types of violations because of the possible application of the Convention on the Non-Applicability of Statutes of Limitations for War Crimes and Crimes against Humanity, 1968. 117/ Moreover, as domestic legal systems vary widely, it would be valuable to clarify the scope and effect of limitations clauses in national law and procedure. 118/

3. Jurisdiction

55. The two sets of guidelines differ in their approach to establishing universal jurisdiction. The van Boven Guidelines plainly state that: "every State shall provide for universal jurisdiction over gross violations of human rights and international humanitarian law which constitute crimes under international law". 119/ Instead, Mr. Joinet does not make this broad pronouncement. In contrast, the Joinet Guidelines urge that provision for universal jurisdiction be included in all international human rights treaties or instruments dealing with serious crimes. Through widespread ratification, universal jurisdiction could then be achieved. 120/ There remains a divergence of views on the issue of the universality of criminal jurisdiction and there is little support in conventional and customary international law to support such a sweeping declaration that universal jurisdiction exists for all "gross violations of human rights". 121/ Moreover, this raises the question whether modalities for redress should be deemed part of universal jurisdiction or part of another normative regime.

4. Notification of remedial measures

56. Both sets of guidelines contain provisions for public and private notification of the procedures available for reparations. 122/ The van Boven Guidelines only state that a State must make reparation procedures known. 123/ In contrast, the Joinet Guidelines provide more specific instructions as to the notification process, calling, for "the widest possible publicity" both within and outside the country, including through the use of consular services, particularly in countries where large numbers of victims have been forced into exile. 124/ In fact, the 1997 proposed changes to the van Boven Guidelines eliminate the language calling for international notification where necessary. 125/

5. Information relevant to claims

57. The van Boven Guidelines state that a State shall make available to competent authorities all information in its possession relevant to the determination of claims for reparation. 126/ The Joinet Guidelines do not contain a similar pronouncement. However, this duty could be inferred from their extensive reference to truth commissions, the right to truth and the duty to remember. 127/ Nevertheless, it should be noted that none of the principles in the Joinet Guidelines mandate assistance with respect to specific claims.

IV. A COMPARISON OF THE DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER WITH THE VAN BOVEN AND JOINET GUIDELINES

58. There are several areas of convergence between the Declaration of Basic Principles of Justice, the van Boven Guidelines and the Joinet Guidelines. Nevertheless, there are also notable differences. This section will explore differences with respect to the scope of the documents, the elements of reparation, and procedural issues.

A. The respective scope of the Declaration, the Joinet Guidelines and the van Boven Guidelines

59. At the outset, it should be noted that the Declaration of Basic Principles of Justice is primarily concerned with the victims of domestic criminal law and domestic abuse of power. 128/ Thus, the documents are initially distinguishable since the Joinet and van Boven Guidelines focus mainly on violations of human rights and international humanitarian law. 129/ Notwithstanding this, the Declaration does refer to international norms. However, it does not provide for reparation for victimss unless these norms are incorporated in domestic legislation. 130/ In instances where international norms are not a part of domestic law, the Declaration simply urges that they be incorporated and that remedies be provided for their violation. 131/

B. The elements of reparation

60. The elements of reparation enunciated in the Declaration of Basic Principles of Justice for victims of crimes are quite different than those in the van Boven and Joinet Guidelines. The differences concern the various elements of reparation and the allocation of responsibility for reparation.

1. Defining the elements of reparation

61. The Declaration of Basic Principles of Justice does not distinguish between restitution, compensation, and assistance in the same manner that the van Boven and Joinet Guidelines differentiate between restitution, compensation and rehabilitation. In the van Boven and Joinet Guidelines, restitution is concerned with restoring to victims their liberty, citizenship and employment; 132/ compensation is concerned with any economically

assessable damages such as pain and suffering, lost opportunities and harm to reputation; 133/ and rehabilitation is concerned with providing medical, psychological, legal and social services. 134/

62. In contrast, the Declaration of Basic Principles of Justice is not this extensive or elaborate. The restitution section calls for the return of property or payment for the harm suffered and reimbursement of expenses incurred as a result of the victimization. 135/ This provision seems to fulfil the function of both the restitution and compensation sections of the van Boven and Joinet Guidelines, albeit in a significantly less specific manner. Instead of providing additional measures for the recovery of damages, the compensation section of the Declaration suggests an alternate source of funds to make the reparation called for in the restitution section. 136/ The assistance section parallels the rehabilitation section of the Joinet and van Boven Guidelines in providing for medical, psychological and social services. 137/

63. In addition, the Declaration of Basic Principles of Justice provides for restitution in the form of restoration of the environment in cases of crime causing substantial harm to it. 138/ Also, one final significant difference is the omission in the Declaration of collective measures of satisfaction and guarantees of non-repetition, which are both discussed in the van Boven and Joinet Guidelines. 139/

2. The allocation of responsibility

64. The allocation of responsibility for making reparations to victims is approached differently in the van Boven and Joinet Guidelines and in the Declaration of Basic Principles of Justice. While the van Boven and Joinet Guidelines are specific as to the various elements of reparation, they do not articulate clearly who is responsible for providing them to the victim. With respect to certain elements such as collective measures of satisfaction or guarantees of non-repetition, it is clear that the duty to provide them will fall on the State, since these types of measures fall within traditional State functions. 140/ However, the matter of paying compensatory damages is quite different. 141/ The van Boven and Joinet Guidelines do not articulate clearly whether the State or the individual offender will provide the remedy in such cases 142/ nor what the ultimate position of the State is relation to the victim who cannot secure compensation. In this context, it would be important to specify what legal consequences exist where the State fails: (a) to provide a legal basis for redress; (b) to provide access to means of adjudication; and (c) to provide an enforceable remedy. Furthermore, it is necessary to make clear what consequences at the international level exist in connection with the State's non-observance of the claimant's rights vis-à-vis a wrongful act and whether this gives rise to a legal cause for action.

65. In contrast, the Declaration of Basic Principles of Justice plainly sets forth the allocation of responsibility for making restitution to the victim. The primary onus to make restitution to victims and their families is on the offender. 143/ However, where the offence was committed by a public official acting in an official or quasi-official capacity responsibility shifts to the State, even if it is a successor State. 144/ In cases where the offender or other sources are unable to compensate a victim, the State is urged to provide

a remedy. 145/ Nonetheless, the Declaration urges only that the burden shift from the offender to the State in cases where the victim has suffered serious physical or mental injury or in instances where claims are brought by the dependants of persons who have been killed or incapacitated. 146/

C. Procedural issues

66. The Declaration of Basic Principles of Justice and the van Boven and Joinet Guidelines show consistency on a number of procedural issues. The Declaration states that victims are entitled to redress and recommends that States should establish judicial and administrative mechanisms for victims to obtain prompt redress. 147/ In addition, the Declaration encourages the process to be responsive and sensitive to the victims by including them in any proceedings that affect their interests and by ensuring their safety. 148/ These concerns are also fully addressed by the van Boven and Joinet Guidelines. On the other hand, the van Boven and Joinet guidelines specifically add the right of access to international procedures to supplement domestic mechanisms for redress. 149/ In addition, the Declaration remains silent with respect to jurisdiction, perhaps because the Basic Principles are focussed more on domestic law.

V. AN ASSESSMENT OF THE PROVISIONS ON REPARATIONS FOR VICTIMS IN THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT

67. The portion of the Statute of the International Criminal Court (ICC) dealing with compensation for victims is significantly less extensive than either the Declaration of Basic Principles of Justice or the van Boven or Joinet Guidelines on this issue, primarily because, as the article dealing with reparations to victims states, the "Court shall establish principles relating to reparations". 150/ Nevertheless, several facets of the Statute should be taken into consideration.

68. First, the Statute defines reparations slightly differently from either the van Boven or Joinet Guidelines. The Statute defines reparations as restitution, compensation and rehabilitation. 151/ However, both sets of guidelines add collective measures of satisfaction and guarantees of non-repetition to the Statute's definition. 152/

69. Second, the Statute contemplates a trust fund out of which reparations to victims may be made. 153/ This idea of an international fund seems similar to the concept of trust funds enunciated in the Declaration of Basic Principles of Justice. 154/ However, it is not mentioned in either set of guidelines. In addition, the Statute also provides for protection of victims and witnesses during Court proceedings - which accords with all three sets of principles. 155/

70. Finally, it should be noted that the ICC Statute does not provide for a definition of a victim or the exact damages recoverable under the various measures of reparations (medical expenses, loss of earning, etc.). These types of concerns are important especially since a comparison of the Basic Principles of Justice and the van Boven and Joinet Guidelines reveals a lack

of uniform terminology in this area. On the other hand, the establishment of these principles on reparations to victims could perhaps be left to the International Criminal Court.

VI. MAIN ISSUES TO BE RESOLVED

71. Following the above review of the various provisions 156/ dealing with reparation, restitution, compensation and rehabilitation for victims, this section raises some questions and observations that deserve further study.

72. There is a lack of uniformity and consistency in terminology, not only in the van Boven and Joinet guidelines, but also in various United Nations reports dealing with the issue, as discussed above (para. 6). For example, the terms "human rights", "human rights and humanitarian law", "human rights and international humanitarian law", "human rights and fundamental freedoms", and "internationally recognized norms relating to human rights" are often used interchangeably and sometimes cumulatively.

73. In addition, there is also a lack of consistency as to what exactly is meant by the terms "victim", "reparation", 157/ "restitution", "compensation", and "rehabilitation", as well as in discussions concerning possible modalities for redress. It seems important to arrive at a more consistent usage of key terms so as to avoid unnecessary confusion over possible legal implications and concepts.

74. This lack of uniformity and consistency raises several questions, for example, what does the term "human rights" cover? Does it include all United Nations international conventions on the subject, or all other instruments not contained in conventional international law - in other words, only binding instruments - or "soft law" as well? What is the difference between the various human rights enunciated in international conventions or other instruments? What is the legal difference between a "violation" and a "gross violation" and would such a distinction imply different legal consequences in the case of breach? To which human rights violations do the different modalities of redress apply? Is international humanitarian law to be considered part of human rights or as a separate source of law, in spite of the fact that there are areas where violations of international humanitarian law also constitute violations of internationally protected human rights? For the purposes of ensuring the provision of redress to the victim, should there be a distinction between "breaches" and "grave breaches" of the Geneva Conventions? Is the customary law of armed conflict included? Should human rights violations prohibited in conventions of a penal nature 158/ (international criminal law treaties) be considered to rise to another level requiring a different approach? Do violations of norms of a jus cogens character also imply the existence of or the need for a separate regime?

75. Indeed, the invocation of international humanitarian law also presents certain questions. For example, international humanitarian law is regarded by some as limited to the regulation of armed conflicts, including the customary law of armed conflict, as well as some or all of the 34 conventions concerning the prohibition and control of the use of weapons. 159/ But some commentators include in that meaning of international humanitarian law genocide and crimes against humanity. 160/

76. Another set of questions arises with respect to the gradation of violations, and whether there is a gradation of modalities for redress. For example, the domestic criminal law of most legal systems distinguishes between the seriousness of criminal violations and attributes different penalties and victims' rights depending on the seriousness of the offence. Should the criterion of the seriousness of the offence determine distinct regimes for redress?

77. Considering that there is a range of modalities of redress for victims, the question arises as to who is responsible for providing any of these modalities of redress: the violator in his/her personal capacity, the State, non-State actors, or legal entities under private law? Modalities of redress may include medical, psychiatric, psychological and social rehabilitation or support services. Who or what legal entity bears responsibility to provide access to modalities of redress? When redress for victims requires financial compensation, does the individual violator or the State bear the burden? In situations where the individual offender cannot be found or is financially unable to make reparation, should the State assume the cost of any shortfall?

78. A question also arises with respect to the sources of the international legal obligation to provide any or all modalities of redress for different types of human rights violations. For example, on the one hand it may be clear that jus cogens 161/ violations require redress; on the other hand, no established international legal norms clarify whether any of the modalities mentioned above, other than financial reparation and restitution ad integrum, are required. With respect to other non-jus cogens human rights violations, it is unclear what the relevant source of international law may be and what is proscribed. Conversely, "general principles" 162/ of international law adduced from the world's major legal systems may first provide a legal basis for modalities of redress to be established at the international level and, second, may promote the acceptance of the revised guidelines among the "general principles".

79. How is the measure of damages and compensation to be established in view of significant differences in legal systems and economic standards? In what manner and in which forums should such damages and compensation be determined and awarded? With respect to large-scale victimization, should there be collective standards of redress or should redress always be on a case-by-case basis? Should there be similar or different standards for violations committed by State actors and non-State actors?

80. In the interests of harmonizing the treatment of all these questions, it would be opportune at this stage to ensure that the expert's mandate be fully coordinated with the mandate on impunity, as well as with the work of the Preparatory Commission for the International Criminal Court.

VII. RECOMMENDATIONS

81. It follows from the above analytical comparison of the van Boven and Joinet Guidelines, and taking into account the Declaration of Basic Principles of Justice and the Statute of the International Criminal Court, as well as the views of Governments which submitted comments, that a number of important

matters in the guidelines remain to be clarified or resolved before a revised version can be prepared in accordance with Commission on Human Rights resolution 1998/43. Some of these issues are highlighted below.

The terminology must be clarified

82. In addition to numerous substantive differences in the documentary sources discussed above, discrepancies remain concerning the use of terms. Many of the inconsistencies, far from being minor or insignificant, may seriously obfuscate a clear rendering of the applicable international legal norms on the right to "reparation". 163/ The expert intends to review the various sources and content of international and national norms on restitution, compensation and rehabilitation in respect of human rights violations in a systematic and thorough way and to clarify the relevant terms in order to promote maximum conceptual consistency and accuracy in this area.

The point of departure for the development of coherent guidelines on the right to reparation must be the victim

83. In seeking to clarify both the terms and concepts of the right to reparation, the expert believes it necessary to adopt the victim of violations as the point of departure for the development of coherent guidelines governing this right. Extraneous considerations concerning sources of law, or the particular interests of one or other Government, should not obscure the fundamental imperative of ensuring that victims of violations receive reparation.

The relationship between the right to reparation in human rights law and the relevant international humanitarian law provisions should be clarified

84. If the moral and conceptual point of departure for revising the guidelines on the right to reparation is the victim, then it follows that the guidelines should not exclude violations committed in the context of armed conflict. First, violations perpetrated during internal or international armed conflict may be at least as serious, if not more so, than those committed in peacetime. Second, international human rights law contains norms which permit no suspension, infringement or derogation, regardless of whether or not there exists a public emergency, even war. 164/ The right to reparation for violations of these non-derogable rights cannot be excluded from the revised guidelines. Moreover, as many of these non-derogable rights, such as the right not to be tortured, killed or enslaved, overlap with or are more clearly set out in norms of international humanitarian law, the expert considers it necessary to clarify the normative connection of the right to reparation to both international human rights law and international humanitarian law.

The term "gross violations of human rights"

85. As discussed above, the term "gross violations of human rights" is used in various places in connection with the right to reparation without adequate clarification. It seems obvious that, if the right to reparation were defined as applicable only to "gross violations of human rights", then it would be necessary to have available an accepted legal definition of this term.

However, it would appear that the term "gross violations of human rights", has been employed in the United Nations context not to denote a particular category of human rights violations per se, but rather to describe situations involving human rights violations by referring to the manner in which the violations may have been committed or to their severity. It may well be, then, that the term "gross violations of human rights" should be understood to qualify situations, with a view to establishing a set of facts that may figure as a basis for claims adjudication, rather than to imply a separate legal regime of reparations according to the particular rights violated.

86. The expert considers that the meaning and relevance of the term "gross violations of human rights" with respect to the right to reparation, and its appropriate place, if any, in the revised guidelines, is a matter that needs to be squarely addressed.

The issue of a Government's financial burden for violations attributable to a prior regime

87. In international law, the doctrine of legal continuity and principles of State responsibility make a successor Government liable in respect of claims arising from a former government's violations. However, in cases similar to that of Rwanda, which had to cope with the consequences of the 1994 civil war, genocide and related violations, in which some 1 million persons were killed and much of the country's infrastructure was destroyed, the normal rules relating to State responsibility and succession may create an unfair burden that may need to be addressed by the international community. In an era when ethnic conflict and civil war have become increasingly common in comparison to international armed conflicts, the responsibility of a new Government to pay for past violations may require a specific guiding principle, which should be incorporated in the guidelines.

The measure of damages should correlate to the gravity of the harm suffered

88. Notwithstanding the ambiguity surrounding the term "gross violations of human rights", and the need for it to be clarified, it is a basic principle of justice that the measure of damages should be commensurate with the gravity of the harm suffered.

89. The expert considers it necessary to study the legal criteria employed at the international, regional and national levels designed to ensure that, in claims for restitution, compensation and rehabilitation, the measure of damages awarded correlates to the gravity of the harm suffered.

Forthcoming Preparatory Commission discussions to review the Rome Statute of the International Criminal Court

90. As discussed above, a number of provisions in the Rome Statute of the International Criminal Court bear on the right to reparation. This issue will remain under discussion in Preparatory Commission meetings scheduled to be convened in 1999 to review matters outstanding in the Rome Statute. The expert intends to take these discussions into account to ensure that the revised guidelines reflect any important developments in that forum which relate to his mandate.

Towards universally acceptable guidelines through a broad consultative process

91. It remains of cardinal importance that the guidelines, once revised, are amenable to universal application by all States. The guidelines should thus reflect the various legal cultures and traditions of the world, rather than those of only one or some sections of the globe. Otherwise, some States would naturally feel such guidelines to be alien.

92. To ensure the universality of the revised guidelines, the expert considers it necessary to conduct an in-depth comparative study of the relevant international, regional and domestic norms of States Members of the United Nations in order to reveal patterns and trends in the application of the right to restitution, compensation and rehabilitation in cases of human rights violations.

93. Following clarification of conceptual, terminological and normative ambiguities remaining in the guidelines, through a broad consultative process, the expert plans to ensure that the Guidelines and Principles can gain wide international support and be formulated in a way that can best advance the right of victims to compensation, reparation and restitution for human rights violations.

94. In order to fulfil the mandate entrusted to him in Commission resolution 1998/43, the expert considers it necessary to hold consultations with interested Governments, intergovernmental organizations and non-governmental organizations, and to conduct research on national laws and procedures pertaining to restitution, compensation and rehabilitation, as well as on the relevant international legal norms at the global and regional levels, and then to submit, by the summer of 1999, a draft report to Governments, United Nations agencies, bodies and programmes, intergovernmental organizations, the International Committee of the Red Cross and NGOs, for their views and comments. With a view to harmonizing the guidelines with existing forms of remedy, the expert considers it necessary to conduct a systematic review of forms of rights and remedies as they pertain to the mandate, the ways and means of the individual right of access by nationals and aliens before national legal bodies, and finally, the question of international legal consequences for failure to provide substantive redress for such right of procedural access to judicial and administrative bodies.

95. Given the large number of remaining complex conceptual and terminological ambiguities, the expert emphasizes that considerable research must be carried out before the guidelines can be substantively revised in a manner that harmonizes them with laws and procedures already developed at international, regional and national levels. Further consultations are needed with Governments, inter-governmental organizations and non-governmental organizations, as well as with special rapporteurs, experts, special representatives, working groups and other Commission mechanisms, as discussed above. To this end, the expert recommends that the necessary funds be made available to the mandate so that a study on these norms and procedures can be carried out by a consultant. This would enable the expert to undertake a much fuller and more comprehensive analysis with a view to finalizing the revision of the guidelines.

Notes

1/ In his note to the Commission on Human Rights (E/CN.4/1999/53), submitted pursuant to paragraph 3 of Commission resolution 1997/29 in which the Commission requested him to prepare an additional report on the basis of the replies he received from States, the Secretary-General indicated that further replies received from the Governments of Benin, Colombia, Paraguay and Uruguay had been submitted to the independent expert, pursuant to paragraph 3 of resolution 1998/43, so that the expert might take account of them in the preparation of his present report to the Commission. Replies received from a number of international organizations, United Nations agencies and programmes and non-governmental organizations were also submitted to the expert.

2/ Mr. Theo van Boven prepared three versions of the basic principles and guidelines on the right to reparation for victims. The first version is found in document E/CN.4/Sub.2/1993/8 of 2 July 1993, section IX, and will be hereinafter referred to as "the 1993 van Boven Guidelines". The second version is found in document E/CN.4/Sub.2/1996/17 of 24 May 1996 and will be hereinafter referred to as "the 1996 van Boven Guidelines". The third version is found in document E/CN.4/1997/104 of 16 January 1997, hereinafter referred to as "the 1997 van Boven Guidelines (revised)" or "the 1997 proposal". Where reference is made simply to "the van Boven Guidelines", this should be taken to mean either the 1996 or 1997 versions.

3/ See Commission on Human Rights resolution 1998/53 on impunity, adopted without a vote on 17 April 1998, in which the Commission noted the report submitted by Mr. Louis Joinet pursuant to Sub-Commission decision 1996/119 (E/CN.4/Sub.2/1997/20/Rev.1) and the set of principles for the protection and promotion of human rights through action to combat impunity annexed to the report, and decided to continue consideration of the matter at its fifty-fifth session.

4/ There are two versions of the final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119 on the question of the impunity of perpetrators of human rights violations (civil and political) (E/CN.4/Sub.2/1997/20 of 26 June 1997 and E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997). The set of principles they each contain will be referred to as the "Joinet Guidelines" and the "revised Joinet Guidelines".

5/ See "Reining in impunity for international crimes and serious violations of fundamental human rights: Proceedings of the Siracusa Conference", Nouvelles Études Pénales (No. 14, 1998); "Accountability for international crimes and serious violations of fundamental human rights", Law and Contemporary Problems (No. 59, 1996).

6/ See, for example, the report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission resolution 1997/38 (E/CN.4/1998/38), which in Chapter III reviews information transmitted by the Special Rapporteur to Governments, as well as the replies received from 15 December 1996 to 5 December 1997 concerning this mandate, including aspects relating to the right to restitution.

7/ See, for example, the report of the Special Rapporteur, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights resolution 1997/61 (E/CN.4/1998/68), Chapter III, sections J and K of which consider the questions of impunity and the rights of victims, respectively. In section K, the Special Rapporteur refers to "the right of victims or their families to receive fair and adequate compensation within a reasonable period of time".

8/ In the report of the Special Rapporteur on violence against women, its causes and consequences, submitted in accordance with Commission resolution 1997/44 (E/CN.4/1998/54), Ms. Radhika Coomaraswamy referred to the need for legal remedies for victims, including an individual right to compensation, rehabilitation and access to social services in the context of the permanent international criminal court, and at the national level, mechanisms to provide redress for victims, including compensation for injuries and costs, as well as the provision of economic, social and psychological assistance to victim-survivors of sexual violence during times of armed conflict.

9/ See the final report submitted by Ms. Gay J. McDougall, Special Rapporteur of the Sub-Commission (E/CN.4/Sub.2/1998/13).

10/ In paragraph 103 of her progress report, submitted pursuant to Commission resolution 1997/9 (E/CN.4/1998/10), the Special Rapporteur Mrs. Fatma-Zohra Ksentini, recommended the institution of independent national commissions of inquiry with judicial or quasi-judicial powers in cases of alleged illicit movement or attempted dumping of toxic wastes or dangerous products. Among their envisaged functions would be "to guarantee effective means of redress so that victims can obtain adequate compensation or reparation, and to propose remedies to rectify the situation and to prevent the recurrence of illicit practices".

11/ See, for example, paragraphs 88 and 112 of the report on the situation of human rights in the Federal Republic of Yugoslavia (E/CN.4/1998/15) submitted pursuant to Commission resolution 1997/57 by Ms. Elisabeth Rehn, former Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia. To take another example, in the Report of the Special Rapporteur on the independence of judges and lawyers (E/CN.4/1998/39/Add.1) - a thematic mandate - Mr. Param Cumaraswamy made reference to a "right to compensation" in the national context of Peruvian amnesty laws and the question of impunity in connection with his mission to Peru of 9 to 15 September 1996.

12/ See, for example, the report of the Working Group on Enforced or Involuntary Disappearances (E/CN.4/1998/43), in which the Working Group noted that some States had begun to provide financial compensation to victims of enforced disappearance. Considering this to be important, the Working Group, on 27 June 1997, wrote to those countries with more than 20 cases of alleged disappearance pending on their files to seek information on each country's practice in this respect, requesting information on the legal basis for compensation in the country, the legal requirements and legal procedures leading to a presumption of death, and who is responsible to initiate such procedures, whether the payment of compensation requires a presumption of death, whether the Government uses the method of exhumation to determine the identity of a person reported to have disappeared, whether the Government has

in fact compensated victims or families of victims of disappeared persons. The Working Group further indicated that, by the time of publication of its report, 12 countries - Argentina, Chile, Ethiopia, Guatemala, Honduras, India, Morocco, Peru, the Philippines, Sri Lanka, Turkey and Uruguay - had submitted information concerning compensation for victims or relatives of victims of enforced or involuntary disappearances.

13/ See, for example, the final report on the question of the impunity of perpetrators of human rights violations (economic, social and cultural rights), prepared by Mr. El Hadji Guissé, Special Rapporteur, pursuant to Sub-Commission resolution 1996/24 (E/CN.4/Sub.2/1997/8). In paragraph 140, the Special Rapporteur recommended that: "As for cultural goods and those illegally acquired during the period of apartheid, the adequate form of remedy is restitution where this is possible. Those who have been illegally dispossessed must be able to retrieve their full property and cultural goods must be given back to the peoples who are their genuine owners."

14/ See the Discussion guide for the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (A/CONF.187/PM.1 and Add.1).

15/ The expert has taken into account comments received from the Governments of Chile, Croatia, Germany, Japan, the Philippines and Sweden, contained in document E/CN.4/1998/34, as well as a communication received from the International Committee of the Red Cross, references to which appear wherever appropriate.

16/ 1993 van Boven Guidelines, principles 1 to 7.

17/ 1993 van Boven Guidelines, principles 8 to 11.

18/ 1993 van Boven Guidelines, principles 12 to 20.

19/ 1996 van Boven Guidelines, principle 1.

20/ 1996 van Boven Guidelines, principle 2.

21/ 1996 van Boven Guidelines, principle 2.

22/ 1996 van Boven Guidelines, principle 3.

23/ 1996 van Boven Guidelines, principles 4 to 5.

24/ 1996 van Boven Guidelines, principle 6.

25/ 1996 van Boven Guidelines, principles 7 to 11.

26/ 1996 van Boven Guidelines, principles 12 to 15.

27/ The identification of the legal source of that duty appears necessary.

28/ 1993 van Boven Guidelines, principle 1.

29/ 1996 van Boven Guidelines, principle 1.

30/ The issue of State responsibility has been on the agenda of the International Law Commission since 1949. At its 1997 session, the Commission adopted a provisional timetable geared to resolving a number of issues, including the question of international crimes, the regime of countermeasures and the settlement of disputes. See first report on State responsibility by Mr. James Crawford, Special Rapporteur (A/CN.4/490).

31/ 1993 van Boven Guidelines, principle 1.

32/ 1993 van Boven Guidelines, principle 1.

33/ 1996 van Boven Guidelines, principle 3.

34/ "Reining in impunity for international crimes and serious violations of fundamental human rights: Proceedings of the Siracusa Conference" Nouvelles Études Pénales, (No. 14, 1998); "Accountability for international crimes and serious violations of fundamental human rights, Law and Contemporary Problems (No. 59, 1996).

35/ 1993 van Boven Guidelines, principle 2.

36/ 1993 van Boven Guidelines, principle 2.

37/ 1993 van Boven Guidelines, principle 5.

38/ 1993 van Boven Guidelines, principle 5.

39/ Mechanisms that may be referred to as "truth commissions" have been created in Argentina, Bolivia, Chad, Chile, El Salvador, Ethiopia, the Federal Republic of Germany, Guatemala, the Philippines, Rwanda, South Africa, Uganda, Uruguay, and Zimbabwe. See Priscilla Hayner, "Fifteen truth commissions: A comparative study", Human Rights Quarterly (No. 16, 1994).

40/ 1993 van Boven Guidelines, principle 11 (e).

41/ 1996 van Boven Guidelines, principle 2.

42/ 1993 van Boven Guidelines, principle 11 (e).

43/ 1996 var Boven Guidelines, principle 15 (e).

44/ 1996 van Boven Guidelines, principle 15.

45/ 1993 van Boven Guidelines, footnote to principle 2.

46/ 1993 van Boven Guidelines, principle 4.

47/ 1996 van Boven Guidelines, principle 7.

48/ 1996 van Boven Guidelines, language prior to principle 12.

49/ 1996 van Boven Guidelines, principle 12.

50/ 1993 van Boven Guidelines, principle 8 (emphasis added). "Restoration of citizenship" remains in the 1996 version.

51/ 1993 van Boven Guidelines, principle 9 (f).

52/ 1996 van Boven Guidelines, principle 13 (c).

53/ See paragraph 18 above.

54/ 1993 van Boven Guidelines, principle 11 (c).

55/ 1996 van Boven Guidelines, principle 15 (c). The Government of Sweden noted that requiring an official judicial declaration might be interpreted as contravening the independence of the judiciary since Governments cannot/should not be able to require a certain decision from a court in a certain case. See comments of Sweden, paragraphs 11 and 12.

56/ 1993 van Boven Guidelines, principle 20.

57/ The 1997 proposed title is: "Basic principles and guidelines on the right to reparation for victims of [gross] violations of human rights and international humanitarian law".

58/ The Government of Chile noted the removal of "gross" as a modifier of violations in van Boven's 1997 proposed guidelines, indicating that it would be a fundamental change in the scope of the guidelines and, in the light of that change, it was essential to define and differentiate adequately between "gross violations" and "violations". See comments of Chile, paragraphs 2 to 4. The Government of the Philippines supported the removal of "gross" and expressed the opinion that the act of violation itself should serve as a basis of the claim to a right of restitution, compensation or rehabilitation and not the gravity of its nature. See comments of the Philippines, paragraph 2.

59/ 1996 van Boven Guidelines, principle 2.

60/ 1996 van Boven Guidelines, principle 2.

61/ 1996 van Boven Guidelines, principle 9.

62/ Both the Governments of Chile and the Philippines expressed the view that this is an important addition. See comments of Chile, paragraph 25; comments of the Philippines, paragraph 3.

63/ 1997 van Boven Guidelines (revised), see for example, title and principles 1, 2, 5, 9, 11, 12, 13, 15 (g).

64/ 1997 van Boven Guidelines (revised), principle 6.

65/ 1997 van Boven Guidelines (revised), principle 7. The Government of the Philippines supported the removal of this text. See comments of the Philippines, paragraph 6.

66/ 1997 van Boven Guidelines (revised), principle 6. The Government of Chile expressed the opinion that the text rightly specified that the connection should be a close one. See comments of Chile, paragraph 28. The Government of Croatia expressed its opinion that allowing the immediate

family, dependants and other persons closely connected with the victim to claim reparation was praiseworthy, but the precedence of these claims was not articulated. See comments of Croatia, paragraphs 5 and 6.

67/ 1997 van Boven Guidelines (revised), principle 13 (e).

68/ 1997 van Boven Guidelines (revised), principle 15 (g).

69/ The 1996 and 1997 principles and guidelines proposed by Mr. van Boven will be referred to as the van Boven Guidelines. Where appropriate, a distinction will be made between the 1996 and 1997 versions. All citations to the van Boven Guidelines may be imputed to the 1997 proposed changes, except as specifically noted.

70/ The two sets of guidelines prepared by Mr. Joinet were issued within months of each other. Since the two versions contain significant differences with respect to reparation for victims, the present report compares the van Boven Guidelines to each of the other two documents.

71/ van Boven Guidelines, principle 7; Joinet Guidelines, principle 39.

72/ van Boven Guidelines, principle 12.

73/ Joinet Guidelines, principle 40.

74/ van Boven Guidelines, principle 12; Joinet Guidelines, principle 40.

75/ van Boven Guidelines, principle 12; Joinet Guidelines, principle 40.

76/ van Boven Guidelines (revised), principle 13 (e).

77/ Joinet Guidelines, principle 41 (emphasis added).

78/ van Boven Guidelines, principle 13.

79/ van Boven Guidelines, principle 7 (emphasis added).

80/ van Boven Guidelines, principle 4 (emphasis added).

81/ van Boven Guidelines, principle 14; Joinet Guidelines, principle 42.

82/ Joinet Guidelines, principle 44.

83/ Joinet Guidelines, principle 44 (a) to (e).

84/ van Boven Guidelines, principle 15.

85/ van Boven Guidelines, principle 15 (d).

86/ Joinet Guidelines, principle 44 (a).

87/ van Boven Guidelines, principle 15 (a).

88/ van Boven Guidelines, principle 15 (b).

89/ van Boven Guidelines, principle 15 (c).

90/ van Boven Guidelines, principle 15 (h) (i).

91/ van Boven Guidelines, principle 15 (h) (ii).

92/ van Boven Guidelines, principle 15 (h) (iii).

93/ van Boven Guidelines (revised) (E/CN.4/Sub.2/1997/20/Rev.1, principle 15 (h) (iv).

94/ van Boven Guidelines (revised) (E/CN.4/Sub.2/1997/20/Rev.1, principle 15 (h) (v).

95/ Joinet Guidelines, principle 46.

96/ Joinet Guidelines, principle 47.

97/ Joinet Guidelines, principles 48 to 50.

98/ See Joinet Guidelines (revised). Principle 36 refers to paragraph 41, which in turn refers to the 1996 van Boven Guidelines.

99/ Joinet Guidelines (revised), paragraph 41.

100/ See paragraphs 25 to 29 above, which discuss the 1997 proposed changes to the 1996 version of the van Boven Guidelines.

101/ Joinet Guidelines (revised), principles 37 to 41.

102/ van Boven Guidelines, principle 7.

103/ Joinet Guidelines, principle 43; Joinet Guidelines (revised), principle 36.

104/ van Boven Guidelines, principle 1.

105/ van Boven Guidelines, principle 2.

106/ Joinet Guidelines, principle 36; Joinet Guidelines (revised), principle 33.

107/ van Boven Guidelines, principle 3.

108/ Joinet Guidelines, principle 36; Joinet Guidelines (revised), principle 33.

109/ van Boven Guidelines, principle 1.

110/ van Boven Guidelines, principle 4; Joinet Guidelines, principle 37; Joinet Guidelines (revised), principle 34.

111/ van Boven Guidelines, principle 5; Joinet Guidelines, principle 37; Joinet Guidelines (revised), principle 34.

112/ van Boven Guidelines, principle 6; Joinet Guidelines, principles 36, 40, 44; Joinet Guidelines (revised), principle 36.

113/ van Boven Guidelines, principle 9; Joinet Guidelines, principle 27; Joinet Guidelines (revised), principle 24.

114/ Joinet Guidelines, principle 27; Joinet Guidelines (revised), principle 24.

115/ van Boven Guidelines, principle 9 (emphasis added).

116/ The Government of Chile noted that it seemed inappropriate to propose the non-applicability of statutory limitations in civil and not in criminal cases, leaving unmet the obligation to prosecute and punish cases of serious violations mentioned in principle 15 (c), merely because of the passage of time.

117/ General Assembly resolution 2391 (XXIII) of 26 November 1968.

118/ It should be noted also that article 29 of the Rome Statute of the International Criminal Court (A/CONF. 183/9) provides that: "The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations".

119/ van Boven Guidelines, principle 5.

120/ Joinet Guidelines, principle 24; Joinet Guidelines (revised), principle 21.

121/ See M. Cherif Bassiouni and Edward M. Wise, "Aut dedere aut judicare: The duty to extradite or prosecute" in International Law (1995) Part I, pp. 3-69; and Lyal S. Sunga, The Emerging System of International Criminal Law: Developments in Codification and Implementation (1997), Chap. V.2, pp. 250-256.

122/ van Boven Guidelines, principle 8; Joinet Guidelines, principle 38; Joinet Guidelines (revised), principle 35.

123/ van Boven Guidelines, principle 8. The Government of Sweden noted the ambiguity as to whether the principle confers upon the State a duty to actively spread the information or merely to provide information upon request. See comments of Sweden, paragraph 8.

124/ Joinet Guidelines, principle 38.

125/ van Boven Guidelines (revised), principle 8. The Government of the Philippines expressed the opinion that this language should remain in the guidelines. See comments of the Philippines, paragraph 7.

126/ van Boven Guidelines, principle 10. The Government of Japan noted that it should be understood that disclosure of information should be

restricted from the point of view of the protection of individual privacy, as well as for investigation and trial. See comments of Japan, paragraph 6.

127/ Joinet Guidelines, principles 1-18; Joinet Guidelines (revised), principles 1-17.

128/ Basic Principles of Justice, principle 1.

129/ van Boven Guidelines, principle 1; Joinet Guidelines, principle 1 (note that the Joinet Guidelines only discuss violations of human rights).

130/ Basic Principles of Justice, principles 18 and 19.

131/ Basic Principles of Justice, principle 19.

132/ van Boven Guidelines, principle 12; Joinet Guidelines, principle 40; Joinet Guidelines (revised), principle 36 (refers to van Boven's definitions).

133/ van Boven Guidelines, principle 13, Joinet Guidelines, principle 41; Joinet Guidelines (revised), principle 36 (refers to van Boven's definitions).

134/ van Boven Guidelines, principle 14, Joinet Guidelines, principle 42; Joinet Guidelines (revised), principle 36 (refers to van Boven's definitions).

135/ Basic Principles of Justice, principle 8.

136/ Basic Principles of Justice, principles 12 and 13.

137/ Basic Principles of Justice, principles 14 and 17.

138/ Basic Principles of Justice, principle 10.

139/ van Boven Guidelines, principle 15; Joinet Guidelines, principles 44 to 50; Joinet Guidelines (revised), principles 36 to 42. Even though the revised version does not consider guarantees of non-repetition an element of victim reparation, it still contains provisions regarding it in the section on the right to reparation.

140/ van Boven Guidelines, principle 15; Joinet Guidelines, principles 44 to 50; Joinet Guidelines (revised), principles 36 to 42.

141/ van Boven Guidelines, principle 13; Joinet Guidelines, principle 41; Joinet Guidelines (revised), principle 36.

142/ The Government of Chile noted that national law systems have various ways of regulating the State's liability for illicit acts and that it would seem appropriate to include in the set of basic principles a specific provision establishing the State's immediate, direct liability for compensation, without prejudice to the right to attempt to recover from the individual offender. Comments of Chile, paragraphs. 17 to 21.

143/ Basic Principles of Justice, principle 8.

144/ Basic Principles of Justice, principle 11.

145/ Basic Principles of Justice, principle 12.

146/ Basic Principles of Justice, principle 12 (a) and (b).

147/ Basic Principles of Justice, principles 4 and 5.

148/ Basic Principles of Justice, principle 6.

149/ van Boven Guidelines, principle 4; Joinet Guidelines, principle 37; Joinet Guidelines (revised), principle 34.

150/ ICC Statute, article 75, paragraph 1.

151/ ICC Statute, article 75, paragraph 1.

152/ van Boven Guidelines, principle 7; Joinet Guidelines, principle 39. The Statute's definition is, however, the same as that in the revised Joinet Guidelines, see Joinet Guidelines (revised), principle 36.

153/ ICC Statute, article 79.

154/ Basic Principles of Justice, principle 13. In this context, it should be noted that a number of trust funds have been created in connection with certain categories of human rights violations, for example, the United Nations Voluntary Fund for Victims of Torture and the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery.

155/ ICC Statute, article 68; van Boven Guidelines, principle 5; Joinet Guidelines, principle 37; Joinet Guidelines (revised), principle 34; Basic Principles of Justice, principle 6 (d).

156/ van Boven Guidelines, Joinet Guidelines, Declaration of Basic Principles of Justice and ICC Statute.

157/ van Boven uses the term "reparation" to refer collectively to "restitution", "compensation", "rehabilitation", and "satisfaction and guarantees of non-repetition". See van Boven Guidelines, principle 7.

158/ There are 25 categories of international crime: 1. aggression; 2. war crimes; 3. unlawful use, production and stockpiling of certain prohibited weapons; 4. crimes against humanity; 5. genocide; 6. apartheid; 7. slavery and slave related practices; 8. torture; 9. unlawful human experimentation; 10. piracy; 11. offenses against international maritime navigation; 12. unlawful seizure of aircraft; 13. attacks against internationally protected persons; 14. taking of hostages; 15. unlawful use of the mails (for terror-violence); 16. drug offenses (international); 17. destruction and/or theft of national treasures and cultural heritage; 18. environmental violations; 19. cutting of submarine cables; 20. international traffic in obscene materials; 21. counterfeiting (currency); 22. bribery of foreign public officials; 23. theft of nuclear materials; 24. use of mercenaries; and 25. crimes against the United Nations and associated personnel. See M. Cherif Bassiouni, International Criminal Law Conventions and their Penal Provisions (1997).

159/ M. Cherif Bassiouni, Criminal Law Conventions and their Penal Provisions, (1997), pp. 515-599.

160/ M. Cherif Bassiouni, "The normative framework of international humanitarian law: Overlaps, gaps, and ambiguities", Transnational Law and Contemporary Problems (No. 8, 1998), p. 199.

161/ M. Cherif Bassiouni, "International crimes: Jus cogens and obligations erga omnes", Law and Contemporary Problems (No. 9, 1996); Karen Parker and Lyn Beth Neylon, "Jus cogens: Compelling the law of human rights", 12 Hastings International Law Review (No. 585, 1998); Gordon A. Christenson, "Jus cogens: Guarding interests fundamental to international society", Virginia Journal of International Law (No. 28, 1988); Mark Janis, "Jus cogens: An artful not a scientific reality", Connecticut Journal of International Law (No. 370, 1988).

162/ M. Cherif Bassiouni, "A functional approach to 'general principles of international law'", Michigan Journal of International Law (No. 768, 1990).

163/ The term "reparation" here is used as shorthand for the longer formulation, "restitution, compensation and rehabilitation", used in Commission resolution 1998/43. It is worth considering whether a more neutral term, such as "redress" might be more appropriate to qualify the subject of the expert's mandate.

164/ See report of the Meeting of Experts on Rights Not Subject to Derogation during States of Emergency and Exceptional Circumstances, (E/CN.4/Sub.2/1995/20, annex I). See also D. Prémont, C. Stenersen and I. Oseredczuk (eds.), Non-Derogable Rights and States of Emergencies, 1996. See further Chowdhury, Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency, 1989.